

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PATRICK J. O'DEA, JR.	:	DETERMINATION
		DTA NO. 816402
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period December 1, 1990 through November 30, 1993.	:	

Petitioner, Patrick J. O'Dea, Jr., 753 South Broadway, Hicksville, New York 11801, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1990 through November 30, 1993.

On July 21, 1998, the Division of Taxation ("Division"), by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to timely file a petition contesting the statutory notice at issue. Petitioner, appearing by Joel A. Goldman, CPA, responded in opposition to the Division's motion by submitting a letter dated August 25, 1998 with attached documents. This August 25, 1998 submission commenced the 90-day period for issuance of this order pursuant to section 3000.5(d) of the Rules. Based upon the motion papers, affidavits and documents submitted therewith, petitioner's documents in response, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Patrick J. O'Dea, by his representative, Joel A. Goldman, CPA, filed a Request for Conciliation Conference (Form DTF-996.5) with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). This request, dated June 20, 1995, challenged an assessment numbered L-010366312. An attached letter stated that petitioner "has never been an officer nor held any position, authoritative or otherwise with Freeman Windows Inc." The typewritten address "35A Anchor St., Freeport, NY 44520-5215" appears under petitioner's name on the face of the request. However, this address has been manually crossed out and item "1" of the request form, titled "[e]nter any change of address here", lists petitioner's address as "Patrick J. O'Dea, Jr., 107-14 91st St., Ozone Park, NY 11417." This latter address is the same as petitioner's representative's address.

2. The requested conciliation conference was held on March 19, 1996. Thereafter, a Conciliation Order (CMS No. 148424) was issued. This order, dated on its face November 28, 1997, states that the statutory notice (L-010366312) was recomputed (presumably reduced) to \$212,617.17, plus penalty and interest.

3. Petitioner continued his challenge to the statutory notice by filing a petition with the Division of Tax Appeals. This petition, contesting assessment number L-010366312, was filed via certified mail on March 14, 1998. Petitioner asserts, in his petition, that the matter should be combined with another pending matter (notice number L-011083780). The petition further states that "[w]e are filing this in what seems late but is really not since the conciliation order dated

November 28, 1997 was not received until March 9, 1998. Please note they have addressed the conciliation order to Mr. O'Dea at my [petitioner's representative's] address, which is incorrect.”

4. The Division responded to the petition by filing an answer dated May 14, 1998. In its answer, the Division asserts that petitioner is not entitled to a hearing on the merits of the case because the petition had not been timely filed, i.e., filed within 90 days from the date of the conciliation order. On July 21, 1998, the Division brought the subject motion for summary determination, seeking dismissal of the petition on the basis that it had not been timely filed.

5. As proof of mailing of the conciliation order to petitioner, the Division submitted affidavits made by Thomas J. English and James Baisley, employees of the Division, a copy of the certified mail record (“CMR”) listing the conciliation orders allegedly issued by the Division on November 28, 1997, and a copy of the conciliation order (CMS No. 148424) in question. The submitted CMR lists petitioner, and petitioner's representative, Joel A. Goldman, CPA, as persons to whom conciliation orders dated November 28, 1997 were allegedly mailed.

6. The affidavit of Thomas J. English, who has held the position of Assistant Supervisor of Tax Conferences in the Division's BCMS since October 1987, sets forth the Division's general procedure for preparing and mailing out conciliation orders. This procedure culminates in the orders being sent by certified mail through the United States Postal Service (“USPS”), with BCMS receiving confirmation of the mailing via receipt of a postmarked copy of the CMR.

7. Mr. English's affidavit describes the computerized preparation of conciliation orders and the preparation of a CMR, the record listing those taxpayers to whom conciliation orders are being sent by certified mail on a given day. The conciliation orders and the CMR are prepared by BCMS word processing personnel, and are reviewed by a BCMS clerk assigned to process conciliation orders. The clerk, as part of her regular duties, verifies the names and addresses of

taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk affixes the sequential certified control number stickers to envelopes for each listed taxpayer and representative, and then records on the CMR, under the heading "Certified No.," the certified control number from each envelope next to the appropriate name. In this case, certified control number P 482 631 627 was used for the conciliation order to be mailed to petitioner, Patrick J. O'Dea, Jr., and P 482 631 628 was used for the conciliation order to be mailed to petitioner's representative, Joel A. Goldman, CPA. Mr. English explains that the CMR is kept by BCMS in the regular course of business. The CMR and the related conciliation orders to be mailed are picked up in the BCMS offices by an employee of the Division's Mail Processing Center and, after mailing, the CMR is returned to BCMS for retention as a permanent record.

8. According to Mr. English, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to sign.

9. Mr. English attests to the truth and accuracy of the copy of the two-page certified mail record attached to his affidavit, which contains a list of the conciliation orders allegedly issued by the Division on November 28, 1997, including, on page one, an order addressed to petitioner, Patrick J. O'Dea, Jr., at 107-14 91st Street, Ozone Park, New York 11417, and an order addressed to petitioner's representative, Joel A. Goldman, CPA, at the same address.

10. Review of the two-page CMR in this matter reveals certified control numbers running consecutively from P 482 631 620 through P 482 631 634, for a total of 15 items on CMR page

one, and P 482 631 635 through P 482 631 636, for a total of two items on CMR page two, with no deletions on either page.¹ The upper right hand side of each page of the CMR in this case reflects the typewritten issuance date November 28, 1997, and the upper left hand side of each page reflects the handwritten date “11/28/97”. The bottom of each of the two CMR pages reflects the November 28, 1997 date stamp of the Colonie Center branch of the USPS. The first CMR page lists “15” as the Total Number of Pieces Listed by Sender, and this figure is circled. The second CMR page lists “2” as the Total Number of Pieces Listed by Sender, and the number “2” is handwritten on such page next to the listing Total Number of Pieces Received at Post Office. Finally, the listing “Postmaster, Per (Name of receiving employee),” appearing at the base of each CMR page is initialled.

11. The affidavit of James Baisley, who has held the position of Chief Processing Clerk in the Division’s Mail Processing Center since 1994, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branch offices of the USPS. Mr. Baisley states that the CMR is the Division’s record of receipt from the Colonie Center branch of the USPS for pieces of certified mail sent by the Division. Mr. Baisley explains that after a document is placed in the Mail Processing Center’s “Outgoing Certified Mail” basket, a member of the staff weighs and seals each envelope and places “postage” and “fee” amounts on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the CMR. A member of the Mail Processing Center then delivers the envelopes and the CMR to the Colonie

¹The names and addresses of other taxpayers to whom conciliation orders were issued, as reflected on the CMR in question, have been redacted to preserve the confidentiality of information relating to such other taxpayers.

Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and also may place his or her signature or initials on the CMR indicating receipt by the post office.

12. Review of the CMR at issue, as described above, reveals that both pages are initialed and bear the November 28, 1997 USPS postmark of the Colonie Center branch, that on page one (where the name and address of petitioner and petitioner's representative appear) the listing of 15 total pieces of mail, corresponding to the number of pieces of listed on such page, has been circled, and that on page two the number "2", corresponding to the number of pieces of mail listed on such page, has been handwritten after the heading "Total Number of Pieces Recieved at Post Office." With regard to CMR page one, where the mailings in question are listed, Mr. Baisley states that his knowledge that the postal employee circled the "Total Number of Pieces" for the purpose of indicating that 15 pieces of mail were received at the post office is based on the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or write the number of pieces received on the mail record to indicate the total number of pieces received by the USPS. The CMR is picked up by a Mail Processing Center employee the day after its delivery to the post office and is returned to the originating office, in this case to BCMS.

13. In response to the Division's motion, petitioner maintains that this matter is fully interrelated with another case pending before the Division of Tax Appeals (DTA No. 816402), and that the two cases should be combined. In this regard, petitioner notes that both matters were combined for conciliation conference purposes. Petitioner also repeats the allegations raised in the petition that the conciliation order, though dated November 28, 1997, was not received until March 9, 1998, and that the conciliation order issued to petitioner, Patrick J. O'Dea, Jr., incorrectly bore the address of petitioner's representative Mr. Goldman.

CONCLUSIONS OF LAW

A. There is no dispute that the petition in this matter was filed with the Division of Tax Appeals when it was mailed by certified mail on March 14, 1998. It is also undisputed that there is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). According to Tax Law § 170(3-a)(e) and Tax Law § 1138(a) (former [1])², the order in this case and the underlying notice of determination (as recomputed in accordance with the order), would be binding upon petitioner unless, within 90 days from the date of issuance of the order, a petition was filed with the Division of Tax Appeals. If a taxpayer fails to file a timely petition protesting the statutory notice or the conciliation order, the Division of Tax Appeals is precluded from hearing the merits of the case, having no jurisdiction over the matter (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. It is clear that the March 14, 1998 filing date of the petition in this case falls more than 90 days after the claimed November 28, 1997 issuance date of the conciliation order, and thus it would appear that the petition is untimely. However, petitioner has disputed the Division's claim that the petition is untimely. Where the timeliness of a petition challenging a conciliation order is at issue, the initial inquiry must focus on the issuance (i.e., mailing) of the order, and the Division bears the burden of proving both the fact and date of mailing (*Matter of Novar TV &*

²Tax Law § 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (*see, McKinney's Cons Law of NY*, Book 1, Statutes § 51[b]). Since the assessment in this case pertains to the time period December 1, 1990 through November 30, 1993, the amendment to Tax Law § 1138(a)(1) does not apply.

Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

C. An order is mailed when it is delivered to the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When an order is found to have been properly mailed by the Division, a presumption arises that the order was delivered or offered for delivery in the normal course of the mail to the person to whom it was addressed (*Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643, *affd* 62 NY2d 943, 479 NYS2d 188; *Matter of Katz*, *supra*). The mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz*, *supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. English and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) conciliation orders. Furthermore, the Division has offered adequate proof to establish the fact that the particular order was actually mailed to petitioner and to his representative on November 28, 1997, the date appearing on the face of the order. Specifically, the affidavits of Mr. English and Mr. Baisley, together with the CMR, show the total number of pieces of mail received by the USPS, including pieces of mail addressed to petitioner and to his representative, and the postmarks on the CMR, in turn, show the date of mailing as November 28, 1997 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is noted that the figure “15” on the first page of the CMR, where petitioner and petitioner’s representative are

listed, has been circled. In turn, the Division's affiant states that the circling of this figure indicates that this was the number of pieces of mail received by the USPS, and states that he knows this to be the case because the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by either circling or writing the number on the CMR. In short, the English and Baisley affidavits, consistent in all respects with the information listed on the face of the CMR and the conciliation order in question, provide direct documentary evidence confirming the November 28, 1997 date and fact of mailing of the subject order. Accordingly, consistent with the reasoning in *Roland (supra)*, the Division has met its burden of proof on the question of actual mailing in this case.

E. Petitioner's response to the Division's motion consists of a claim that this matter should be combined with another pending matter, allegedly because they are entirely interrelated or interdependent, and that the petition was in fact timely because although dated November 28, 1997, the order was allegedly not received by petitioner until March 9, 1998. In this latter regard, petitioner also claims that the order was erroneously addressed to him at his representative's address.

F. Petitioner's claim that the order was not received until March 9, 1998 amounts to a bare assertion or general denial of personal receipt of the order in the regular course of the mail. The presumption of receipt in due course which arises upon the Division's demonstration of proper mailing was a rebuttable presumption (*see, Matter of Ruggerite, Inc., v. State Tax Commn.*, 64 NY2d 688, 485 NYS2d 517, 518). However, as a matter of law, a bare allegation of nonreceipt or late receipt, standing alone, is insufficient to rebut the presumption of receipt in due course (*see, T.J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97, 98-99; *Matter of American Cars-R-Us, Inc. v. State Tax Commn.*, 147 AD2d 795, 537 NYS2d 672;

Engel v. Lichterman, supra). Here, the Division has established proper mailing, and petitioner's bare claim that the order was not received until some three months thereafter is not sufficient to overcome the presumption of delivery in the normal course of the mail so as to conclude that the petition filed on March 14, 1998 was timely filed.

G. Petitioner also claims that the order was erroneously addressed to him at his representative's address. However, petitioner fails to explain why the Division would be in error in addressing a conciliation order in direct compliance with the information on the face of a taxpayer's request for a conciliation conference. As noted in Finding of Fact "1 ", petitioner's request specifically included a change of address, and the Division honored the same by addressing the order to such changed address. In fact, if the Division had not honored this change but instead mailed the order to the prior address listed for petitioner, a valid argument could be made for tolling the period of limitations on filing since the order was not addressed to petitioner's last known address as required (*see*, Tax Law § 1147[a][1]).

H. Finally, petitioner maintains that this matter should be combined with another matter pending appeal, noting that the two matters are "fully interrelated." It is often advantageous, in terms of administrative economy and convenience, to consolidate interrelated matters such as those involving assessments against entities and the persons allegedly under a duty to act on behalf of such entities with respect to tax obligations. However, such consolidation cannot occur until it is clear that the jurisdictional prerequisite of a timely filed petition has been met with respect to each case before the Division of Tax Appeals (*see, Matter of Roland, supra*).³ In this

³The petition date in this matter, and in the allegedly interrelated matter, clearly fall well before the July 22, 1998 effective date of chapter 456 of the Laws of 1998 (*see*, Tax Law § 1138[a][3][B]).

case, such prerequisite has not been met, and thus the Division of Tax Appeals is without jurisdiction to hear and decide the merits of petitioner's case.

I. The Division's motion for summary determination is granted and the petition of Patrick J. O'Dea, Jr. is hereby dismissed.

DATED: Troy, New York
November 19, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE